

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN PENNSYLVANIA

3 Case No. 01-01139

4 - - - - - x

5 In the Matter of:

6

7 W.R. GRACE & CO., et al.,

8

9 Debtors.

10 - - - - - x

11

12 United States Bankruptcy Court

13 Robert N.C. Nix Sr. Federal Courthouse

14 900 Market Street

15 Philadelphia, PA 19107

16

17 December 15, 2020

18 3:00 PM

19

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21 B E F O R E :

22 HON ASHELY M. CHAN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO - JOAN RANIERI

1 HEARING re Request for Extension

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 PACHULSKI STANG ZIEHL & JONES LLP

4 Attorney for W.R. Grace & Co.

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8 BY: JAMES E. O'NEILL, ESQ. (TELEPHONICALLY)

9

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17 ALSO APPEARING TELEPHONICALLY:

18 VIKTORIYA SHPIGELMAN

19 GARY S. SMOLKER, pro se

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1 P R O C E E D I N G S

2 THE COURT: All right, call the parties in the --
3 see who's on the line here.

4 CLERK: Well, there's one guest that Tasha has to
5 get.

6 COURT REPORTER: All right, guest with the last
7 four digits of your phone number 1984, can I have your last
8 name, please?

9 MR. HIGGINS: Higgins, H-I-G-G-I-N-S, Roger
10 Higgins, counsel for W.R. Grace.

11 COURT REPORTER: Thank you. All right.

12 THE COURT: We have Jamie O'Neill on the line yet?

13 COURT REPORTER: No.

14 THE COURT: We do not.

15 MR. HIGGINS: I don't believe so, Your Honor. And
16 --

17 THE COURT: Okay.

18 MR. HIGGINS: Viktoriya Shpigelman will be also
19 joining, too. Our --

20 CLERK: Shpigelman is on.

21 THE COURT: Okay.

22 CLERK: Shpigelman is on.

23 MR. HIGGINS: Okay, great.

24 MS. SHPIGELMAN: Yes, good morning, Your Honor.
25 Viktoriya Shpigelman.

1 THE COURT: Okay. Good afternoon. All right, so
2 we should -- and did you get the name of the claimant,
3 Tasha, the pro se --

4 COURT REPORTER: We have on the line Mr. Higgins,
5 Ms. Shpigelman -- sorry if I'm pronouncing that incorrect.
6 I apologize -- and Mr. Smolker.

7 MR. SMOLKER: Correct.

8 THE COURT: Okay, so -- all right, great. So why
9 don't we just give Mr. O'Neill a minute or two. He
10 requested this call, so I'm sure he'll be with us shortly.
11 One of you wants to --

12 MR. HIGGINS: Yes, he will, Your Honor. We just -
13 - he and I just spoke a few minutes ago.

14 THE COURT: Oh, great. Okay. I've been having
15 some conversations with my fellow judges about hearing for
16 tomorrow. You know, we're set to have this big northeastern
17 storm tomorrow and we have a Zoom trial at 2:00 p.m. and
18 some of my other judge colleagues also have big hearings on
19 for tomorrow and they're getting requests for extensions
20 because of the snow storm.

21 But since we're all doing everything virtually,
22 seems like an unusual request, right? Like, you're in your
23 house. You're on your computer. Unless you get power
24 disconnected, why couldn't you still do it, you know? It's
25 like my kids are complaining that there's no snow days

1 anymore. You have to kind of question that.

2 MR. HIGGINS: Although, Your Honor, I was doing a
3 mediation last week and was supposed to get on a mediation
4 call -- I'm on the West Coast -- at 6:00 a.m. Pacific, 9:00
5 a.m. and the power went out at 4:00 a.m. because a drunk
6 driver took out two telephone poles.

7 THE COURT: Oh, no. Oh, my --

8 MR. HIGGINS: Yeah, yeah.

9 THE COURT: Well, that's a good excuse. That's
10 like the dog ate my homework. I would excuse that.

11 COURT REPORTER: Mr. McNeill -- sorry, Mr. O'Neill
12 was on the line --

13 THE COURT: Okay.

14 MR. O'NEILL: Yes, hi.

15 THE COURT: -- see me?

16 MR. O'NEILL: Good afternoon. Yes, hello.

17 THE COURT: All right. Great. So Tasha, do you
18 want to start the recording and Joan, do you want to call
19 the matter?

20 COURT REPORTER: We are recording.

21 CLERK: All right, this is the three o'clock
22 status hearing on for Judge Chan for December the 15th.
23 It's on W.R. Grace and Company. Could parties make their
24 appearance, please?

25 MR. O'NEILL: Sure. This is James O'Neill,

1 Pachulski, Stang, Ziehl, and Jones, and I represent W.R.
2 Grace. And I believe I'm joined today by my co-counsel in
3 the matter Roger Higgins and also appearing my phone I
4 believe is our client, Viktoriya Shpigelman from Grace.

5 MR. SMOLKER: And I'm on the call. So, my name is
6 Gary Smolker. I'm representing myself.

7 THE COURT: Okay. Well, Mr. O'Neill, you called
8 this status hearing, so I'll let you proceed.

9 MR. O'NEILL: Thank you very much, Your Honor, and
10 thank you so much for taking the time today on such very
11 short notice, but I appreciate it.

12 THE COURT: No problem.

13 MR. O'NEILL: Your Honor, this is regarding the
14 Smolker claim litigation and as Your Honor will recall, we
15 have a scheduling order in place and briefing is ongoing.
16 And we had a status hearing some time ago and after that
17 time, there was an extension given and a status scheduling
18 order put in place.

19 According to the scheduling order, Mr. Smolker was
20 supposed to respond to Grace's motion for summary judgment
21 on the 16th of December, and yesterday there was an exchange
22 with Mr. Smolker between Mr. Smolker and Mr. Higgins and
23 myself where Mr. Smolker asked for additional time to
24 respond to the motion for summary judgment. And Mr. Higgins
25 checked with our client and our client has been very

1 concerned with the delay in this matter and the scheduling
2 accommodations made to date, and so Mr. Higgins responded to
3 Mr. Smolker that we would not -- the client would not be
4 willing to give a further extension of the December 16th
5 deadline to file a response.

6 There was an exchange after that time between the
7 parties and we thought, Your Honor, it might be prudent just
8 to touch base with Your Honor to let you know where we were
9 and to perhaps seek the Court's guidance with respect to
10 scheduling issues.

11 And from our standpoint, Your Honor -- from
12 Grace's standpoint, Your Honor, viewed in isolation, a
13 request for a two-week extension is not an unreasonable
14 request, but the concern that we have is that there have
15 been several requests for extension and changes to the
16 proposed schedule and we believe that we've been -- we've
17 tried to accommodate Mr. Smolker with these requests and
18 that kind of gets us to today.

19 We would, of course, be guided by whatever
20 suggestion Your Honor has with respect to scheduling. If
21 there is an extension, the only thing that Grace would want
22 to be sure of was that it would have enough time to file its
23 reply and the Court would have enough time in advance of any
24 hearing to consider the reply and to prepare for the
25 hearing. And ultimately, if there is a further extension

1 given, we would just want to make sure that whatever time is
2 set now is going to stick.

3 So the concern that we have is that it's been a
4 long time. We believe that we have been accommodating and
5 we understand that things happen and that Mr. Smolker has
6 reasons for requesting the extension, which he can explain
7 to the Court. And as I said, Your Honor, viewed in
8 isolation, a two-week extension is not an overwhelming or
9 unreasonable extension.

10 It just is -- when you step back and look at the
11 whole picture, it's been since August that we kind of
12 expected that we'd be moving forward on this matter and we
13 just want to make sure that if the schedule changes now and
14 if things are pushed out further, that whatever new deadline
15 is set is going to be the deadline so that we can move
16 forward to try to get this matter resolved. And that's --
17 those are our issues, you know.

18 THE COURT: Okay, thank you, Mr. O'Neill. So Mr.
19 Smolker, it sounds like you need a two-week extension. Why
20 is that, sir?

21 MR. SMOLKER: They've filed a 750-page, in the
22 aggregate, motion and it requires me to look at voluminous
23 documents and to make evidentiary objections to them and to
24 -- and it's supported by, I believe, one declaration of
25 Rosemary Lewis that I have to make objections to, and

1 there's just so much I want to object to, there wouldn't be
2 enough time to write all my objections and to make my motion
3 for objections and also I object to their request for
4 judicial notice, which will take time.

5 And also they don't follow the rules for a summary
6 judgment, so I have to kind of improvise because they didn't
7 follow Rule 56 about how you're supposed to do a motion for
8 summary judgment. And I have to make my statement of facts
9 and provide references and as I read their thing, and I
10 might've missed it, they don't even have a statement of
11 facts in there, which I believe should be a separate
12 document that would have numbers with what they claim are
13 material facts that are undisputed.

14 And it's somewhat complicated -- actually, it's
15 very complicated, and it could be simply said that I'm right
16 and they're wrong, but I'd rather go into the details. Also
17 I have a medical problem. When I was done with the hearing
18 on the 17th -- and let me go back one second -- there
19 haven't been requests for continuances. What happened was
20 they filed a motion and they said in their motion that I was
21 supposed to respond to their motion in a one-week time,
22 which I thought was completely crazy. So -- whatever time
23 it was. it was some very abbreviated time.

24 So I filed my response and I put in my response
25 there wasn't time to respond to these 750 pages. The next

1 thing I know or knew was Grace's attorney contacted me and
2 said the Court would like us to work out an extension of
3 time so you can have more time to respond. Well, in the one
4 week or however much time they told me I had to respond --
5 and I did prepare to respond -- I couldn't read all 750
6 pages. So I gave them a time and they wouldn't agree with
7 the time so they made us have a status conference in front
8 of you and that's how we got to the status conference.

9 Okay. Now --

10 THE COURT: So Mr. Smolker -- Mr. Smolker, hold on
11 one second. So can I just tell you what I find concerning
12 at this point, is that when we last met telephonically at
13 the last hearing in October, we had agreed on a scheduling
14 order which you wanted, you know, a lengthy amount of time
15 for your response, and I gave you, you know, two months from
16 the date of our hearing for you to respond to the 700-plus
17 page motion. For you to now make a request on the eve of
18 the deadline by which you're supposed to file your response
19 -- because your deadline right now under the scheduling
20 order that I'm looking at is December 16, 2020. It's
21 December 15th.

22 So for you do now tell me that the reason why you
23 can't respond is because of the 700-page document, is not
24 sitting well with me because you knew back in October when
25 we first had this discussion that it was a 700-page

1 document. So again, I ask you, why at the last minute do
2 you require this extension? What's happened since we last
3 met that's prevented you from working on your response?

4 MR. SMOLKER: Okay. I -- as I was about to say,
5 had medical problems. When I was done with the hearing on
6 the 17th, within an hour, I had blood in my eye, a blood
7 vein in my eye broke, and I went to my eye doctor and had
8 that dealt with and I could look up my blood pressure. I
9 guess it was like 160 or 180 over something. Was pretty
10 incredible. And so I had to do things, and I got a -- I
11 went to a pulmonologist because I have breathing problems
12 and I discovered that I have lung damage.

13 And I took a test and he found out that my
14 saturated blood oxygen is below 90 many times during the
15 night, which is very dangerous. And so I spent the first
16 month looking into different things for how to deal with my
17 heart and give my doctor enough information to he could deal
18 with it, and then I had to look up all these federal rules
19 because I don't practice in federal court or in federal
20 bankruptcy court, and then I started reading all their
21 things, and I notice when I read all their things that I
22 have all kinds of objections and evidence to present and
23 it's not practical due to the volume of it.

24 And yes, I did know that there was 750 pages, but
25 I didn't know what the 750 pages said because they only gave

1 me a week to respond and I didn't read the 750 pages in that
2 week. I just got to the nitty gritty of why their thing
3 shouldn't be granted. And this is --

4 THE COURT: Well --

5 MR. SMOLKER: My opposition --

6 THE COURT: Okay.

7 MR. SMOLKER: -- me to review the voluminous
8 documents, which I had to do, and to prepare objections to
9 the evidence they proffered. I didn't know how much
10 evidence I would have to object to and it required me to
11 refer to the federal bankruptcy code and the federal rules
12 of bankruptcy procedure. I wasn't familiar with those. I
13 went and bought books so that I could see what the
14 procedures were. And then I had to review the United States
15 Code. I didn't know what the United States Code.

16 Then I had to look at the local rules of
17 bankruptcy for the Delaware court and then I had to prepare
18 my own papers, including my statement of facts and the
19 statement of my disagreements. I didn't know how many
20 things I would disagree with or how many facts they wouldn't
21 state, and now I do.

22 THE COURT: Well --

23 MR. SMOLKER: So now I'm --

24 THE COURT: Mr. Smolker, again -- so this is my
25 concern. My concern is that the motion for summary judgment

1 was filed on August 3rd, 2020. It's been four months since
2 the motion was filed. I was trying to give you a very
3 generous extension and when we last met and we agreed to the
4 dates, it was my understanding that when you agreed to those
5 dates you understood that you had the two months in which to
6 get all of this done, and --

7 MR. SMOLKER: Yes, but I didn't know what my lung
8 condition was and I didn't know what kind of problems I
9 would have and I didn't know that I would have to spend a
10 month putting together medical records for my pulmonologist
11 to work on and getting involved in different breathing
12 exercises. I didn't know how much time my personal health
13 would take up or how disabled I would be. I just thought I
14 would be able to go forward. I didn't realize how disabled
15 I was and how much information I had to give my
16 pulmonologist.

17 And for example, I'm supposed to see a
18 cardiologist to get a stress exam, and I couldn't make an
19 appointment to see the cardiologist because I've been too
20 busy working on this.

21 THE COURT: So Mr. Smolker, I'd like to just --
22 I'd like you to understand what's facing me, which is that
23 when this first came to me that the motion for summary
24 judgment and you asked me for an extension, normally I would
25 give a party on average about three weeks, maybe a month if

1 it was an extensive motion for summary judgment. But for
2 you, given that you were pro se and the length of the motion
3 for summary judgment, I really wanted to give you enough
4 time to do this.

5 And while I know that you must have some health
6 concerns that you must attend to, right, the other side also
7 has rights. I have to move the case along for them, too,
8 right? It can't all be about what your concerns are, health
9 concerns are, legal concerns are, getting through all the
10 documents and understanding the legalese, but I have to
11 balance that against W.R. Grace. So I'm trying to do the
12 best I can, right. I can't just give you whatever time you
13 may need because they have due process concerns. They
14 didn't want me to give you that lengthy extension until
15 December, but I did it for you.

16 MR. SMOLKER: (indiscernible).

17 THE COURT: And what I'm concerned about is that
18 after I tried to show you this deference for you to come to
19 them at the very last moment and ask for this extension, it
20 jams me up, right, because you're basically telling me now
21 that it's December 15th and although you had agreed to a
22 scheduling order which required you to file something by
23 tomorrow, if I deny your request for an extension, I'm
24 basically -- I don't know if you've been working on your
25 response, but you're putting me in the very uncomfortable

1 position of forcing you to file a pleading which is
2 something that -- in a state which you would argue, I
3 believe, is deficient.

4 I want you to have an opportunity to give them a
5 fulsome response so that when I consider this and determine
6 the matter, I have all of the facts and all of the law
7 before me and by asking this on the eve of the hearing,
8 you're forcing my hand and I just want you to know that I
9 don't appreciate it. Whatever health concerns you may have
10 had, is something that I would've hoped you would've gone to
11 Mr. O'Neill with weeks ago to say, listen, Mr. O'Neill, I
12 know I agreed to this in the scheduling order, but I have
13 the following issues.

14 And by the way, when litigants come to me and tell
15 me that they have medical issues, it wouldn't be entirely
16 unreasonable for Mr. O'Neill to say, with all due respect,
17 Mr. Smolker, I'll need to see some evidence that you
18 actually --

19 MR. SMOLKER: (indiscernible).

20 THE COURT: -- going --

21 MR. SMOLKER: I did show in my --

22 THE COURT: Okay, but just -- if you could just
23 let me finish, Mr. Smolker. So at this point, given all of
24 that, this is what I'm going to do, Mr. Smolker. I'm going
25 to give you your requested two-week extension, but let's be

1 clear about this. I'm not adjourning that extension for any
2 reason at all -- at all. You'll need to make sure that your
3 response is filed and served upon Mr. O'Neill two weeks from
4 tomorrow. So Joan, let's just talk about the date --

5 MR. O'NEILL: The 30th.

6 THE COURT: Yes. You have until December 30th to
7 file that. I don't want to hear any excuses about any
8 problems getting that brief on file. That is your last
9 extension. Now, Mr. O'Neill, I understand your concerns and
10 looking at the scheduling order now, it looks like your
11 reply is due -- I'm just pulling this up now. It looks like
12 --

13 MR. SMOLKER: Your Honor?

14 THE COURT: -- your reply is due on January --
15 yes, Mr. Smolker.

16 MR. SMOLKER: Your Honor?

17 THE COURT: Yes. Yes, Mr. Smolker.

18 MR. SMOLKER: In my letter when I requested it, I
19 gave him the date which would be 14 days later for him to
20 file his response and I gave him the dates that we could
21 either move your hearing date 14 days or we could have it on
22 the same day as you scheduled another hearing, which I think
23 is March 25th. So would you like me to give you the date?

24 THE COURT: No, no, no. What I want you to do is
25 I want you to not talk because I want to talk to Mr. O'Neill

1 right now. So Mr. O'Neill, right now the scheduling order
2 currently has your reply due on January 6 and it sounds like
3 we have a telephonic hearing on the motion for summary
4 judgment on January 21st at 1 p.m. eastern time. So Mr.
5 O'Neill, I think I heard you say that you don't want to have
6 the summary judgment hearing moved. Is that correct?

7 MR. O'NEILL: Well, Your Honor, it's going to be
8 up to you because we -- I don't want to put the Court at a
9 disadvantage. If we move our deadline to two weeks, to the
10 20th, we could definitely one day before the scheduled,
11 hearing, we could move the hearing for two weeks, too, if
12 the Court was available and it works for all of the parties.

13 THE COURT: Right. Well, I'm trying to be
14 accommodating to you because I understand your concern. So
15 I guess my first question is, when do you want to file your
16 reply? Obviously, you don't want to file it January 6th,
17 I'm assuming. So do you want to file it January 6th -- or
18 any time up to and including January 20th. What date would
19 you like, understanding that whatever date you pick, I'm
20 going to have -- I need a little time to review everything,
21 but I'll try and keep it as short as possible. So when do
22 you think you could file your reply?

23 MR. O'NEILL: Of course, Your Honor, and I'm --

24 THE COURT: When do you want to file?

25 MR. O'NEILL: Forgive me for negotiating in front

1 of everybody, but if Mr. Higgins is on the phone, we --

2 MR. HIGGINS: I am.

3 MR. O'NEILL: -- had talked about perhaps having a
4 similar extension so we would, I guess, take a two-week
5 extension to the 20th, if -- Mr. Higgins, if you think that
6 that is the appropriate date, or if there's another date,
7 say so.

8 MR. HIGGINS: Yes, Your Honor. At the risk of
9 making some sausage, the 20th would be fine for us and then
10 we would make ourselves available for hearing at your
11 convenience.

12 THE COURT: Okay. So Mr. O'Neill, if you could
13 revise the prior scheduling order to reflect that Mr.
14 Smolker now is going to have this two-week extension which
15 will bring us to December 30th, okay, you'll prepare the
16 revised scheduling order to put that as his new and final
17 deadline to oppose summary judgment and that would make your
18 two-week deadline to file your reply now January 20th.

19 Joan, I'm looking at my calendar and it looks like
20 we have the (indiscernible) hearing at ten o'clock on the
21 28th. Is that right, Joan?

22 CLERK: That's right, yeah.

23 THE COURT: And that'll take all day, and we still
24 have the Michael -- the Hammond. I have the Hammond --

25 CLERK: --29th.

1 THE COURT: -- claim objection scheduled for the
2 29th. Okay.

3 CLERK: Yep.

4 THE COURT: Let me see.

5 CLERK: On the 4th, you have Lewis and on the 5th
6 you have (indiscernible).

7 THE COURT: Okay. So what about the 1st. Monday,
8 February 1st. I have an appointment at ten o'clock, but I
9 could start as early as 11:30 on Monday, February 1st. If
10 everyone could look at their calendars and tell me if they
11 have availability on Monday, February 1st, please.

12 MR. SMOLKER: I'm available. Gary Smolker is
13 available.

14 THE COURT: Okay.

15 MR. HIGGINS: Your Honor, this is Roger Higgins.
16 I am available then and I will ask our client, Ms.
17 Shpigelman, if she's available that day.

18 THE COURT: Okay. Mr. O'Neill?

19 MR. O'NEILL: Yes, Your Honor. I'm available on
20 that day.

21 THE COURT: Okay. So why don't you put forward
22 the revised scheduling order, which I will sign, and I just
23 note for the record that in Paragraph 3 of the current
24 scheduling order, you've got my first name misspelled. I
25 know I've got an unusual first spelling, but there's an

1 extra E in there. I think you were trying to cover
2 yourself. It's just A-S-H-E-L-Y.

3 MR. SMOLKER: Oh, E-L-Y? I got --

4 THE COURT: Yes.

5 MR. SMOLKER: A-S-H-E-L-Y?

6 THE COURT: Yes. I don't think there's any other
7 person in the world with that spelling, so that's my cross
8 to bear in the world. But it's correct on the signature
9 line, it just is incorrect on Paragraph 3. So if you guys
10 want to correct that, add in those new dates, file that, and
11 maybe you could just, I guess -- do you have Ms. Ranieri's -
12 - Joan Ranieri's information? Because if you just email --

13 MR. O'NEILL: I do, Your Honor.

14 THE COURT: -- it to her, she can email it to me
15 and then -- yeah, and then we can just --

16 MR. O'NEILL: I'm fine --

17 THE COURT: -- send that down to Delaware after I
18 sign it. Okay, great. All right. Does anyone else have
19 any other question --

20 MR. SMOLKER: I do. What time on Monday?

21 THE COURT: Okay, well I was going to say 11
22 o'clock, but I know you're in California, Mr. Smolker. Is
23 that okay? Can you do that by 8 or do you want me to push
24 it back a little bit?

25 MR. SMOLKER: I would prefer doing it at nine, but

1 I could be here by eight.

2 THE COURT: Okay, so let's get the hearing, Mr.
3 O'Neill, at noon on February 1st. Okay? And we'll still
4 have the same telephonic information for the argument.

5 MR. O'NEILL: Okay.

6 MR. SMOLKER: I have something else.

7 THE COURT: Yes, Mr. Smolker.

8 MR. SMOLKER: Would you like a courtesy copy of my
9 papers?

10 THE COURT: No. If you file it with the Court,
11 I'll get a copy.

12 MR. SMOLKER: Okay.

13 THE COURT: Okay? All right. Well, I look
14 forward to reading your response and the reply and then I'll
15 talk to all of you gentlemen on February 1st. Okay,
16 everybody?

17 MR. SMOLKER: Thank you, Your Honor.

18 MR. O'NEILL: Thank you very much, Your Honor.

19 THE COURT: You're welcome. Okay --

20 MR. O'NEILL: Okay. Bye bye.

21 (Concluded at 3:26 PM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

A handwritten signature in cursive script that reads "Sonya M. Ledanski Hyde". The signature is written in dark ink and is positioned above the printed name.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

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Date: January 13, 2021

[& - changes]

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